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The Wiretapping--Eavesdropping Problem: A Defense Counsel's View

Edward Bennett Williams

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I. The Wiretapping Problem

> The truth is that wiretapping today is a plague on the nation. It is a far more serious intrusion on privacy than the general writs of assistance used in colonial days. Now all the intimacies of one's private life can be recorded. This is far worse than ransacking one's desk and closets. This is a practice that strikes as deep as an invasion of the confessional.[1]

Unfortunately, these biting words of Mr. Justice Douglas do not describe a new practice. Wiretapping is as old as the telephone itself; yet, as Samuel Dash, Robert Knowlton, and Richard Schwartz have demonstrated in *The Eavesdroppers*,[2] the problems posed by wiretapping remain as far from solution as ever.

Attorney General Rogers published an article in 1954 which summarized the case for wiretapping.[3] He urged that wiretapping is essential to protect the nation against spies, saboteurs, and other subversives. He further urged that it is no worse than the use of informants, decoys, dictaphones, peeping, and the like, all of which have been accepted practices of law enforcement for many years.

Neither of these arguments, however, is really dispositive of the issue. Informed sources have questioned the real utility of wiretaps in security cases. In the celebrated case of *United States v. Coplon*,[4] for example, the prosecution succeeded in convincing the trial court that none of its evidence came from wiretapping, despite almost continuous interception of the defendant's telephone calls.[5] In other words, the government itself took the curious position that wiretapping had been completely useless.

Professor Louis B. Schwartz, who, during the four years he spent in the Department of Justice, helped prosecute the leading federal

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1. Douglas, The Right of the People 151 (1958).

2. Dash, Knowlton & Schwartz, The Eavesdroppers (1959) [hereinafter cited as Dash].

3. Rogers, *The Case for Wire Tapping*, 63 Yale L.J. 792 (1954).

4. 88 F. Supp. 921 (S.D.N.Y. 1950).

5. See *id.* at 926, *rev'd on other grounds*, 185 F.2d 629 (2d Cir. 1950).

wiretapping cases, has made a fine analysis of this problem.[6] He concluded:

> [I]t is clear that there never was a showing or even a serious attempt to show that we would catch fewer criminals or that criminal activity would increase in case of the unavailability of the surveillance devices involved. All we could prove, and I think all that the current talk of necessity means is that the prosecution will lose a particular conviction, as in the *Coplon* case, when it becomes known that an illegitimate detection device has been employed. This does not prove that future *Coplon* cases cannot be found and successfully prosecuted by more orthodox procedures. Nor is it reasonable to suppose that the failure of the *Coplon* prosecution has encouraged or increased espionage activity. A traitor who risks death if apprehended is certainly not going to be deterred by the knowledge that his telephone may be tapped; at most, he will avoid use of the telephone. . . .[7]

Interestingly enough, these views were once shared by J. Edgar Hoover. In 1940 Hoover termed wiretapping an "archaic and inefficient" practice which "has proved a definite handicap or barrier in the development of ethical, scientific, and sound investigative technique."[8] And again in 1941, he approved a press release stating that "the discredit and suspicion of the law enforcing branch which arises from the occasional use of wiretapping more than offsets the good which is likely to come of it."[9]

Perhaps it may be *easier* to catch spies by wiretapping than by other methods. I suppose law enforcement would also be *easier* if we could use torture, general search warrants, mass arrests, and indefinite police detention. It would likewise be *easier* to convict spies if we could suspend the fifth and sixth amendments in such cases, so that there would be no privilege against self-incrimination and no right to counsel. The difficulty is that we destroy exactly what we are seeking to preserve when we try to protect democracy with essentially totalitarian tools.

There is grave reason to fear, moreover, that a law allowing wiretapping in security cases would provide an opening wedge for permitting wiretapping in all cases. During the eighty-second Congress, a bill was introduced to permit wiretapping in cases involving the national security.[10] During the eighty-fifth Congress, the sponsor of this legislation introduced a bill to permit wiretapping in all felony cases.[11] During the eighty-sixth Congress, this same member intro-

6. Schwartz, *On Current Proposals to Legalize Wire Tapping*, 103 U. Pa. L. Rev. 157 (1954).

7. *Id.* at 160.

8. Letter From J. Edgar Hoover to the *Harvard Law Review*, Feb. 9, 1940, quoted in Note, *Wire Tapping and Law Enforcement*, 53 Harv. L. Rev. 870 n.53 (1940).

9. Department of Justice Press Release, March 15, 1940, quoted at 9 Int'l Jurid. Ass'n Monthly Bull. 103 (1941).

10. H.R. 479, 82d Cong., 1st Sess. (1951).

11. H.R. 12394, 85th Cong., 2d Sess. (1958).

duced a bill to permit wiretapping in all cases.[12] His explanation for this shift in position was that the telephone and telegraph now constitute dangerous channels through which criminal conspiracy can operate with impunity.

As Dash and his colleagues have demonstrated, the record in New York bears out the conclusion that wiretapping is most useful as a weapon against organized vice.[13] The overwhelming majority of the wiretaps authorized in New York have been in gambling, narcotics, and prostitution cases. There have been very few wiretapping orders in prosecutions for the most serious crimes, such as rape, robbery, and murder, because wiretapping is almost useless in such cases. There have likewise been very few orders in security cases. The evils inherent in wiretapping assume far greater proportions when they are balanced, not against the evils of subversion, but against the lesser evils of gambling.

There are even more serious objections to the second argument of the Attorney General—that wiretapping is essentially no different from many accepted law enforcement practices. A crucial difference lies in the extent to which wiretapping invades the privacy of wholly innocent people. None of the legislative proposals to authorize wiretapping would restrict tapping to the wires of *people suspected of crime*. One of the most recent Supreme Court cases in this field involved a tap on a public telephone in a bar.[14] Apparently it is standard practice for the New York police to tap public telephones which may be used by suspects. These taps may record *one* conversation involving a gambler or narcotics offender and *five hundred* conversations involving wholly innocent and unsuspecting people whose most personal affairs are thus laid bare to view.

Even when the police tap the wires of a criminal suspect, they almost inevitably intercept the conversations of many people having no connection with the suspected offense. This serious aspect of the wiretapping problem was humorously illustrated by a cartoon in the Wall Street Journal which showed two detectives giving their superior a staggering stack of records with the explanation: "The guy we wire tapped is the father of a teenage girl!"

Several years ago I tried a case where I was required to read the transcription of hundreds of telephone conversations intercepted by the New York police. For the first time, I really understood why Mr. Justice Holmes once characterized wiretapping as "dirty business." The participants in these conversations included an insurance company, several doctors, a lawyer, numerous department stores, a grocery, a pharmacy, a dairy, and countless other people who were not

12. S. 1292, 86th Cong., 1st Sess. (1959).
13. DASH 40, 65–66.
14. See Benanti v. United States, 355 U.S. 96 (1957).

even suspected of any offense. The taps included many calls in which the defendant was not a participant at all. They included, moreover, conversations of the most confidential character—conversations between husband and wife, lawyer and client, physician and patient. The most intimate details of these people's lives became a matter of police record as the result of a single wiretap.

Furthermore, the fruits of police wiretapping all too often become a matter of public record. Many of my client's conversations were read at a public hearing in the New York courts. At least one of them was reprinted in full by the New York Times. Others were presented before a nationwide television audience during the Kefauver Committee hearings. Unfortunately, this was not an isolated occurrence. The McClellan Committee, for example, used national television to make public countless conversations intercepted by the New York police.

No search warrant could possibly involve so sweeping an intrusion into private affairs. As Professor Schwartz has pointed out:

> A search warrant must specify the things for which the officer is to search and, in general, these must be either articles used to commit the crime or else the proceeds of crime. A search for an object of purely evidentiary significance would almost certainly be held unconstitutional, as in case the warrant purported to authorize the seizure of a personal diary containing an account of the alleged crime. But wire tapping is unavoidably a hunt for evidence, pure and simple, *i.e.*, for incriminating admissions. And since no one can forecast when the incriminating admission will be made, the hunt may have to go on for months, as against the specific and limited temporal authority granted by the ordinary search warrant for tangible things. . . .[15]

Another difference between wiretapping and using an ordinary search warrant is that the victim seldom learns that his wires have been tapped. If government agents seize a man's papers or property without a valid warrant, he can make a motion to the court for their return. However, if government agents listen to a man's most confidential conversations over weeks or months or even years, he may never even discover it. Such abuses cannot be corrected either in a court of law or in the court of public opinion. Only where something incriminating turns up do the courts enter the picture. It is thus the *innocent* who are left completely without remedy.

The federal government's attitude toward wiretapping has been riddled with inconsistencies which have served only to augment the problems inherent in this field. During World War I, Congress prohibited wiretapping because of widespread fear that government communications were being intercepted. But when this proscription expired at the end of the war, wiretapping became one of the gov-

15. Schwartz, *supra* note 6, at 163.

ernment's own chief weapons against Prohibition violators. Law enforcement tapping was discontinued under Attorney General Stone in 1924 but resumed under Attorney General Mitchell in 1931. It was again temporarily discontinued by Attorney General Jackson in 1940 but again resumed by direction of President Roosevelt a few months later.[16] However, since 1940 the government has tapped with appalling consistency whenever it has felt the need to do so. In 1958, J. Edgar Hoover stated publicly that the FBI was operating ninety wiretaps across the country, all in internal security cases.[17] By its own admission, the FBI also employs wiretaps in kidnapping cases.

In 1957 I delivered a lecture in which I challenged the legality of FBI wiretapping. Louis B. Nichols, assistant director of the FBI, wrote me a letter after this lecture in which he summarized the Bureau's present position as follows:

> I am unaware of any court decision which has ruled that wire taps are illegal per se. What the courts have done is to ban evidence secured from wire taps and this whole matter was explored rather fully in the attached statement of the late Mr. Justice Robert H. Jackson when he was Attorney General. In the FBI, telephone taps are utilized only with the written approval of the Attorney General in cases involving internal security or those involving kidnapping.[18]

In his attached statement analyzing section 605 of the Communications Act of 1934,[19] Attorney General Jackson stated:

> There is no Federal statute that prohibits or punishes wire tapping alone. The only offense under the present law is to "intercept any communication *and* divulge or publish" the same. Any person, with no risk of penalty may tap telephone wires and eavesdrop on his competitor, employer, workman or others and act upon what he hears or make any use of it that does not involve divulging or publication.[20]

Section 605 provides that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. . . ." However, it further provides that "no person having received such intercepted communication or having become acquainted with the contents, sub-

16. See Brownell, *The Public Security and Wire Tapping*, 39 CORNELL L.Q. 195, 198–200 (1954); Rogers, *supra* note 3, at 794–95.

17. Wash. Post & Times Herald, May 19, 1958, § A, p. 10, col. 2 (final ed.).

18. Letter From Louis B. Nichols to Edward Bennett Williams, Oct. 25, 1957.

19. Communications Act of 1934, ch. 652, § 605, 48 Stat. 1103, 47 U.S.C. § 605 (1958).

20. Letter From Attorney General Robert H. Jackson to Hon. Hatton W. Sumners, Committee on the Judiciary, March 19, 1941. The Jackson view remains the position of the Attorney General's office even now. See *Transcript of Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 86th Cong., 1st Sess., at 160 (Dec. 15–16, 1959) (testimony of Attorney General William P. Rogers).

stance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall . . . use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto . . . ." Formerly, any violation of this statute was a federal felony.[21] Since 1954, one's first violation constitutes a misdemeanor punishable by imprisonment for one year and a fine of $10,000, and only subsequent violations are punishable as felonies.[22]

In short, not only is it a criminal offense to tap and *divulge* the intercepted information, but also it is a criminal offense to tap and *make use of* the information so derived. The Attorney General's contrary conclusion is clearly erroneous. Unfortunately, however, his subsequent appointment to the Supreme Court has invested this statement with an aura of infallibility which undoubtedly he would have been the first to disclaim had the question arisen. In a leading deportation case, for example, Mr. Justice Jackson concurred in a decision squarely contrary to an opinion which he had given to the Secretary of War when he was Attorney General.[23] In explaining this reversal of opinion, he wrote: "It would be charitable to assume that neither the nominal addressee nor the nominal author of the opinion read it. That, I do not doubt, explains Mr. Stimson's acceptance of an answer so inadequate to his questions. But no such confession and avoidance can excuse the then Attorney General."[24] In a more humorous vein, Mr. Justice Jackson went on to quote Lord Westbury, who once rebuffed a barrister's reliance upon one of his earlier opinions with the comment: "'I can only say that I am amazed that a man of my intelligence should have been guilty of giving such an opinion.'"[25] I feel sure that Mr. Justice Jackson would have retracted his wiretapping opinion with similar grace had the matter been presented to the Supreme Court.

Even if divulgence or publication were a condition precedent to violation of section 605, FBI wiretapping would be illegal. We must assume that FBI agents do not tap for their own amusement. They tap to secure information which is reported to their superiors. When the Department of Justice takes the position, as it has, that divulgence by one government agent to another is not divulgence at all, it defies the plain words of the statute and the decisions of the Supreme Court. The statute provides that "no person" shall intercept a telephone conversation and divulge its contents to "any person." The Supreme Court has specifically ruled that a federal agent is a

21. Communications Act of 1934, ch. 652, § 501, 48 Stat. 1100.
22. 68 Stat. 30 (1954), 47 U.S.C. § 501 (1958).
23. See McGrath v. Kristensen, 340 U.S. 162, 176 (1950) (concurring opinion).
24. *Id.* at 177.
25. *Id.* at 178.

"person" for the purposes of this statute.[26] Any other conclusion would be patently absurd.

Of course, wiretapping has not been done exclusively by the government, but by private tappers as well. However, despite widespread private tapping without a shadow of legal justification, there have been conspicuously few prosecutions for wiretapping. In fact, prior to 1941 there was only one reported federal prosecution.[27] This record compels the conclusion that the Department of Justice is somewhat dubious about its dual position as a tapper and a prosecutor. In 1940, the Department of Justice ordered a federal district attorney to drop his investigation of wiretapping because federal agents were engaged in tapping wires themselves.[28] A 1950 grand jury investigation of wiretapping in the District of Columbia did not result in a single indictment, and a congressional investigating committee subsequently found that the government's unjustifiably narrow construction of "divulgence" had made indictments fairly impossible.[29] With few exceptions, the Department of Justice has been forced to take the position that it could not tap with one hand and simultaneously prosecute private tappers with the other.

While public pressure has compelled several prosecutions of private tappers during the past several years, there has never been a federal[30] prosecution of a state officer. Local police have taken extensive advantage of this virtual immunity. For example, Dash's recent study revealed widespread police wiretapping in all seven states surveyed.[31] Some states, notably New York, have gone so far as to enact constitutional or statutory provisions specifically permitting what the federal law prohibits.[32] Under New York law, the state courts may issue orders which purport to authorize wiretapping by state officers. True, the import of the Supreme Court's holding in *Benanti v. United States*[33] is that every New York policeman who

26. Nardone v. United States, 302 U.S. 379 (1937). See also Application for Order Permitting Interception of Tel. Communications, 28 U.S.L. WEEK 2446 (N.Y. City Ct. Gen. Sess. March 7, 1960) (release of tapped information from police officer to superior officer or assistant district attorney is "divulgence" within the meaning of § 605).

27. See United States v. Gruber, 39 F. Supp. 291 (S.D.N.Y.), *aff'd*, 123 F.2d 307 (2d Cir. 1941).

28. See *Hearings on S. Res. 224 Before a Subcommittee of the Committee on Interstate Commerce*, 76th Cong., 3d Sess. (1940); Westin, *The Wire Tapping Problem: An Analysis and a Legislative Proposal*, 52 COLUM. L. REV. 165, 169 (1952).

29. S. REP. No. 2700, 81st Cong., 2d Sess. 5 (1950); see Westin, *supra* note 28, at 169.

30. Apparently, however, public pressure has been successful in compelling a few *state* prosecutions of law enforcement officers. See Silver, *The Wiretapping-Eavesdropping Problem: A Prosecutor's View*, 44 MINN. L. REV. 835 (1960).

31. See generally DASH 35–285.

32. See, *e.g.*, N.Y. CONST. art. I, § 12; N.Y. CODE CRIM. PROC. § 813-a.

33. 355 U.S. 96 (1957). See also Pugach v. Dollinger, 28 U.S.L. WEEK 2418 (2d

taps a wire under one of these orders and subsequently divulges what he has heard is guilty of a federal crime. Nevertheless, the New York courts continue to issue orders,[34] the New York police continue to tap wires, and the Department of Justice continues to look the other way.

In view of the failure to enforce existing wiretapping prohibitions, it is not surprising that there have been repeated proposals to amend the Communications Act to legalize wiretapping. However, legalizing patent invasions of individual rights is hardly the way to eradicate unfair and unjustifiable law enforcement techniques. The only apparent solution to these problems is to bring wiretapping under the fourth amendment. This was the course advocated thirty years ago by the dissenters in *Olmstead v. United States.*[35] It is the course advocated currently by Mr. Justice Douglas[36] and many other serious students of the law. The intervening years have yielded no acceptable alternative. This course would forever lay to rest the contention that government wiretapping is lawful so long as there is no divulgence outside the Department of Justice. It would likewise bring an end to attempted legislative encroachment upon present prohibitions. Congress can amend or repeal the Communications, Act, but it cannot amend or repeal the fourth amendment.

II. The Eavesdropping Problem

> With modern electronic devices, conversations within the home and the office can be recorded without tapping any wire. The intimacies of private life can be made public without a key being turned or a window being rasied. And those who listen in may be private detectives and blackmailers, as well as law-enforcement officials.[37]

The eavesdropping problem is far newer and far graver than the wiretapping problem. It is particularly serious because it is shrouded in a conspiracy of silence. Only occasionally is there an incident which demonstrates the grim truth to the public—that no conversation, however confidential, is really immune from the threat of a hidden microphone.

Unfortunately, the law relating to eavesdropping is even more chaotic and outdated than the law of wiretapping. Concededly the

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Cir. Feb. 11, 1960) (federal court should stay use in New York court of wiretap evidence obtained under New York law but in violation of § 605 of the Communications Act).

34. *But see* Application for Order Permitting Interception of Tel. Communications, 28 U.S.L. Week 2446 (N.Y. City Ct. Gen. Sess. March 7, 1960); Matter of Interception of Tel. Communications, 9 Misc. 2d 121, 170 N.Y.S.2d 84 (Sup. Ct. 1958) (advisory memorandum).

35. 277 U.S. 438 (1928) (Holmes, Brandeis, Butler, and Stone, JJ., separately dissenting).

36. See Douglas, *op. cit. supra* note 1, at 150–51.

37. *Id.* at 150.

Communications Act is inapplicable unless telephone, telegraph, or radiotelegraph conversations are involved.[38] The applicability of the fourth amendment has not been definitively settled. Federal prosecutors apparently proceed on the rather conceptual theory that any form of electronic snooping is constitutional so long as it is not accomplished by means of a "trespass."[39]

The unhappy state of the law in this field was well demonstrated by the case of Bernard Goldfine. Goldfine, a prominent New England textile manufacturer, came to Washington to testify before a congressional committee created to investigate allegedly improper pressure upon the federal regulatory agencies. After he had testified for several days, he discovered the committee's chief investigator in a room adjoining his hotel suite. The investigator admitted that he had secured this room for the express purpose of overhearing everything said in the Goldfine suite. He admitted that he placed an electronic listening device adjacent to the locked door which separated his room from the Goldfine suit. And he admitted that he overheard conversations even between Goldfine and his wife and between Goldfine and his counsel.

Subsequently, Goldfine refused to answer certain questions propounded by the committee on the ground that they were not pertinent to its authorized scope of inquiry. I represented him in the ensuing contempt case. When I filed motions to suppress any recordings made by the investigator and for other relief, the government's "defense" was that the only conversations overheard by the investigator related to *personal and family matters*, rather than to Goldfine's testimony before the committee. A second "defense" was that the listening device never protruded under the door into Goldfine's suite, and hence there was no trespass.

The trial judge felt constrained to uphold these "defenses" under the authorities, but he said:

> It is certainly understandable that the defendant should complain of and be indignant at the intrusion upon his conversations with his counsel in the manner revealed at the hearing, and it may well be that such should be considered in mitigation of any punishment which would be visited upon him if convicted of the charges in the indictment. . . .[40]

Later the judge permitted Goldfine to enter a plea of *nolo contendere*, despite the government's objection, and suspended his sentence.

The character of the government's "defenses" in this case demon-

38. See Irvine v. California, 347 U.S. 128, 131 (1954). See also On Lee v. United States, 343 U.S. 747, 751–53 (1952); Goldman v. United States, 316 U.S. 129, 134–35 (1942).

39. To support this position, federal prosecutors have relied on such cases as On Lee v. United States, *supra* note 38, at 754; Goldman v. United States, *supra* note 38, at 133–34. See also Irvine v. California, *supra* note 38, at 132.

40. United States v. Goldfine, 174 F. Supp. 255, 259 (D.D.C. 1959).

strates that the time has arrived for a change in the law. The principles of law are radically distorted when eavesdropping becomes defensible on the ground that everything overheard was purely personal and that in any event the eavesdropping device was located outside the victim's room.

Most of the proposed changes, however, overlook both the basic character of electronic eavesdropping and the basic meaning of the fourth amendment. Wiretapping and eavesdropping are generally treated as a single problem, admitting of a single solution. Those who defend one defend both, and those who condemn one condemn both. In New York, for example, court orders are issued for eavesdropping just as they are for wiretapping.[41] There have been proposals in Congress to adopt a similar statute applicable to the federal government.[42]

The flaw in these proposals is that eavesdropping *invariably* and *inevitably* constitutes a hunt for evidence. Wiretapping, on the other hand, has a dual aspect. It may constitute a hunt for evidence, but it may also be employed in a situation where the telephone becomes an instrumentality of crime. Fundamental fairness requires that the police should not stand by helpless when criminals are using the inventions of modern science to perpetrate their criminal designs.

However, this consideration is completely inapplicable to electronic eavesdropping. Its victims are not necessarily using any of the inventions of modern science to perpetrate their criminal designs. When law enforcement officers insist that they must overhear private conversations in private homes and offices, they are not using a new method of law enforcement against a new method of crime commission. Instead, they are using a new kind of scientific achievement to inaugurate a new kind of totalitarianism.

In his famous *Olmstead* dissent, Mr. Justice Brandeis recognized that the fourth amendment is primarily a protection of privacy. He pointed out that when the Constitution was adopted force and violence were the only known methods of compelling incriminatory testimony or the production of private papers. But he continued:

> Subtler and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet. . . .
>
> The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. . . . Can it

41. See note 32 *supra.*

42. See, *e.g.*, S. 1292, 86th Cong., 1st Sess. (1959).

be that the Constitution affords no protection against such invasions of individual security? [43]

As Mr. Richard Schwartz, who wrote the section of *The Eavesdroppers* concerning eavesdropping techniques, so clearly demonstrates,[44] Mr. Justice Brandeis' prophetic fears have now become a reality. Today it is possible to expose to a jury the most intimate occurrences of the home. Recent advances in electronic eavesdropping devices would be incredible if they were not so authoritatively documented. In a few minutes time, any telephone can be transformed into a microphone which transmits every sound in the room even when the receiver is on the hook. Tiny microphones can be secreted behind a picture or in some other inconspicuous location. If wires cannot be readily concealed, a strip of special paint will act as a wire. Moreover, wireless microphones have reached a high degree of sensitivity and strength.

Even more sinister are devices which can pick up every sound in a room from without. Great success has been reported with contact microphones. These devices can be placed on the outside of a picture window or against any surface which acts as a sounding board. The District of Columbia police have reported that a contact microphone placed against the heating duct of a row house from the adjoining premises can pick up every word spoken in the entire house.

There are also reliable reports concerning devices which can pick up conversations hundreds of feet away. A parabolic microphone can pick up conversations through an open window several hundred feet away. The possibility of beaming ultrasonic or electromagnetic waves into a room and thereby overhearing everything said in the room is still at an experimental level, but acoustical experts tell us that it appears possible. The techniques section of *The Eavesdroppers* warns:

> To be certain of defense against any eavesdropping of this kind (and incidentally, against wireless microphones as well), one should shield his room completely with a continuous covering of aluminum foil and substitute for his window glass a special conducting glass made by several of the large glass companies. . . .[45]

The Dash study reveals widespread use of concealed microphones by state police and private detectives alike. This study did not include the activities of federal officers, but if concealed microphones are used by the District of Columbia police, it is only fair to assume that they are used by other officers enforcing federal law. Private eavesdroppers are using concealed microphones in an endless va-

43. Olmstead v. United States, 277 U.S. 438, 473–74 (1928).
44. See, *e.g.*, DASH 303–58.
45. *Id.* at 358.

riety of situations, from wives checking on their husbands' fidelity to business firms checking on their employees' attitudes and efficiency.

Several widely publicized incidents have underscored the frightening potentials of such practices. One such incident involved a concealed microphone in the prison room assigned to a New York attorney for conferences with his client.[46] Public indignation ran especially high when it was discovered that this same room was used for hearing the confessions of Catholic prisoners. Popular indignation also soared when it was discovered that the New York Transit Authority was using hidden microphones to spy on the transit workers' union during a recent strike.

Such practices must be distinguished from situations where a conversation is recorded or transmitted with the consent of one participant. Law enforcement officers, for example, may wear a concealed recording device when interviewing suspects or witnesses. Informers may agree to have a microphone concealed in their clothing when they engage the suspect in an incriminating conversation, so that police officers can overhear the conversation and testify about it in court.

Such conduct may be unethical. Many people whose views I respect also think that it is unconstitutional.[47] Their reasoning, however, has never completely persuaded me on this point. Every time we engage in a conversation we run the risk that the other party may betray us. He may reveal what we have said to our personal enemies, our business competitors, or the police. He may try to blackmail us. Such risks are inherent in human relationships. They are in essence no different from the risk that the person in whom we confide has arranged to record or broadcast what we say by means of some concealed device. The only real distinction is that a simultaneous record or broadcast is more complete and exact than any subsequent report. This is a distinction in degree but not in essence.

Where a conversation is recorded or transmitted without the consent of any participant, an entirely different set of concepts must apply. This is the ultimate invasion of privacy—one which goes well beyond the normal conversational risks one must assume. Physical searches and even wiretapping pale by comparison. It is absurd to hold that the Constitution protects private papers but not private conversations. It is equally absurd to suggest that the law should protect telephone conversations alone.

46. See *id.* at 76–78.

47. See On Lee v. United States, 343 U.S. 747, 758–67 (1952) (Frankfurter, Douglas & Burton, JJ., separately dissenting); United States v. On Lee, 193 F.2d 306, 311–18 (2d Cir. 1951) (Frank, J., dissenting). Each of these dissenters relied on the fourth amendment as a basis for unconstitutionality; Douglas also relied on the fifth amendment.

Eavesdropping, like wiretapping, must consequently be recognized as a search and seizure. It must be brought under the fourth amendment. In my view, this would end eavesdropping by federal officers. No statute purporting to authorize the issuance of warrants for eavesdropping would be constitutional, because the fourth amendment prohibits any attempt to authorize a hunt for incriminating admissions.

As the late Judge Jerome Frank once wrote:

> A dictaphone, by its very nature, conducts an exploratory search for evidence of a house-owner's guilt. Such exploratory searches for evidence are forbidden, with or without warrant, by the Fourth Amendment. . . . A search warrant must describe the things to be seized, and those things can be only (1) instrumentalities of the crime or (b) [*sic*] contraband. Speech can be neither. A listening to all talk inside a house has only one purpose — evidence-gathering. No valid warrant for such listening or for the installation of a dictaphone could be issued. Such conduct is lawless, an unconstitutional violation of the owner's privacy.[48]

Independent of the fourth amendment, moreover, I think that electronic eavesdropping ought to be outlawed. Its dangerous potentialities far outweigh its values as an aid to law enforcement. Judge Frank went on to warn:

> The practice of broadcasting private inside-the-house conversations through concealed radios is singularly terrifying when one considers how this snide device has already been used in totalitarian lands. Under Hitler, when it became known that the secret police planted dictaphones in houses, members of families often gathered in bathrooms to conduct whispered discussions of intimate affairs, hoping thus to escape the reach of the sending apparatus. Orwell, depicting the horrors of a future completely regimented society, could think of no more frightening instrument there to be employed than the "telescreen" compulsorily installed in every house. . . .[49]

If we are to authorize electronic eavesdropping at all, we should certainly confine it to the most serious cases. By common consensus, these are the cases involving national security. But, as Judge Frank pointed out, we defeat our own democratic purposes if we adopt the techniques of totalitarianism in security cases. We do to ourselves from within what we fear most from without.

Private use of electronic eavesdropping devices poses a somewhat different problem from private wiretapping. In the first place, Congress cannot constitutionally regulate private eavesdropping except within narrowly circumscribed limits. It could, for example, outlaw private eavesdropping in connection with labor disputes in industries affecting interstate commerce, but it could not outlaw all private eavesdropping. A fortiori it could not outlaw electronic eavesdropping by state officers. And unless and until the Supreme Court

48. *Id.* at 313–14 n.17.
49. *Id.* at 317.

overrules the doctrine of *Wolf v. Colorado*[50] the states remain free to convict on the basis of evidence secured through eavesdropping devices.[51]

Moreover, if we concede the legality of electronic eavesdropping done with the consent of one of the conversants, it becomes difficult for the states to enforce statutes against electronic eavesdropping where such consent is lacking. So long as the equipment is available for legitimate purposes, it will be difficult to curb its use for illegitimate purposes. Nevertheless, the legal distinction between eavesdropping with the consent of one party and without the consent of either, which has been adopted in New York by statute,[52] is correct in principle and deserving of careful consideration by other state legislatures.

III. Recommendations

It would be naive to suppose that the fourth amendment offers an immediate and automatic solution to the problems of wiretapping and eavesdropping. In the first place, the fourth amendment is equally applicable to *all* offenses. The telephone is often used in the commission of relatively minor offenses, such as gambling and prostitution. Even though the fourth amendment would permit wiretapping in such cases, we must consider whether Congress should exercise the full sweep of its constitutional power.

At present, I would advocate legislation restricting the issuance of wiretapping warrants to cases involving national security. Insofar as kidnapping and extortion are concerned, law enforcement officers can secure the consent of the victim or his family to install a wiretap. Under the present statute such consent makes the interception lawful,[53] and the same reasoning should be applicable under the fourth amendment. There has been no showing of necessity in other types of criminal cases sufficient to justify the invasion of individual privacy that wiretapping inevitably entails.

A second problem centers around the authority to issue wiretapping warrants. The Department of Justice has advocated conferring this power upon the Attorney General.[54] I think, however, that this power should be vested in the judiciary, because the judiciary is the traditional bulwark between citizen and prosecutor. Law enforcement officers, like defense attorneys, are sometimes carried away by the merits of their own causes. It is unfair to ask the Department of

50. 338 U.S. 25 (1949).

51. See Schwartz v. Texas, 344 U.S. 199 (1952); *cf.* Wolf v. Colorado, 338 U.S. 25 (1949). *But see* Pugach v. Dollinger, 28 U.S.L. Week 2418 (2d. Cir. Feb. 11, 1960) (decided after the completion of this Article).

52. N.Y. Pen. Law §§ 738–45.

53. See Rathbun v. United States, 355 U.S. 107 (1957).

54. See, *e.g.*, Rogers, *supra* note 3, at 798.

Justice to pass upon the propriety of its own requests for wiretapping authorization.

It has been objected that the secrecy essential to successful wiretapping could not be maintained if every federal judge in the country were empowered to issue wiretapping warrants. It has also been objected that prosecutors would indulge in "judge shopping" and that all applications for warrants would be made before judges willing to grant them without question. I believe that these objections constitute an unwarranted reflection upon the federal judiciary. In order to obviate any possible problem in this area, however, the Chief Justice of the Supreme Court should appoint one judge in each district who would be exclusively empowered to issue wiretapping warrants for a designated period.

Other necessary safeguards include the following: all applications for wiretapping warrants should be approved by the Attorney General; no warrant should be issued for a period longer than twenty days; and at the end of every year, the Department of Justice should report the number of taps installed and the number which resulted in criminal prosecutions, so that the public will be informed as to the extent and fruitfulness of this practice.[55]

Admittedly it may be difficult in a given case for the judge to determine whether a telephone is being used in furtherance of a criminal enterprise or whether it is merely a source of evidence about a criminal enterprise. A rough rule of thumb would be to permit wiretapping before the crime has been committed but not after it is completed. Situations can easily be envisioned, however, where this rule would operate unfairly. Allegations of a continuing conspiracy, for example, might be used to frustrate the constitutional prohibition of evidence-gathering.

The use of wiretapping in conspiracy cases raises the question of standing to challenge the legality of a tap upon some else's wire. By analogy to search and seizure precedents and also to extant wiretapping precedents, only the individual whose conversation was intercepted should have standing to object to the interception. Robert Knowlton, author of the section of *The Eavesdroppers* analyzing the pertinent law, has suggested,[56] however, that the Supreme Court abandoned this technical rule in the *Benanti* case.[57]

The problem of allocating the burden of proof in this field would be just as serious under the fourth amendment as it is under the current statute. At present the authorities are settled that the defendant has the burden of proving that his wires were tapped, but it is not entirely clear whether he also has the burden of proving

55. See generally Malin, *Is Wire Tapping Justified?*, 300 Annals 29 (July, 1955).
56. See DASH 397–98.
57. 355 U.S. 96 (1957).

some use of the intercepted conversations by the prosecution.[58] Use is often very difficult to prove, because either several federal agencies, or both federal and state agencies, may be involved in the preparation of a single case. For example, a federal district attorney prosecuting a case may be completely unaware that state wiretapping revealed the identity of a key witness. No rule of law can obviate this kind of difficulty.

Other complex problems center around the area of federal-state relationships. Would the fourth amendment permit the federal courts to admit evidence secured through state wiretapping? Under what circumstances should state wiretapping be permitted? What sanctions should Congress impose to deter illegal state wiretapping? The answers to these questions under present law would obviously not be controlling under the fourth amendment.[59]

Without minimizing any of the foregoing problems, they are far outweighed by the constructive results of imposing the requirements of the fourth amendment in this field. Experience has demonstrated the difficulty of obtaining adequate legislation. If there is to be reform, it must begin with the courts. Such reform would actually strengthen the government in its fight against subversion, because the intercepted conversations of spies and saboteurs could then be used in court against them. It would not weaken the government's fight against other crimes, because we have been assured that FBI wiretapping is confined to security and kidnapping cases.

By recognizing that we are dealing with searches and seizures in the constitutional sense, we would compel ourselves to strike a balance between the rights of the individual and the rights of society. Under established principles, a search for purely evidentiary material is unlawful.[60] Current proposals to authorize wiretapping and eavesdropping completely ignore these principles. One bill, for example, would authorize the courts to issue warrants for wiretapping and eavesdropping if there is reasonable ground to believe that evidence of a federal crime may be thus obtained.[61] The courts cannot issue warrants for the seizure of tangible objects merely because they constitute evidence of a federal crime, and this same limitation must be applied to warrants for the "seizure" of conversations.

58. See, *e.g.*, Nardone v. United States, 308 U.S. 338, 341 (1939); United States v. Coplon, 185 F.2d 629, 636 (2d Cir. 1950); United States v. Goldstein, 120 F.2d 485, 488 (2d Cir. 1941), *aff'd on other grounds*, 316 U.S. 114 (1942).

59. *Cf.* Hanna v. United States, 260 F.2d 723 (D.C. Cir. 1958); Rios v. United States, 256 F.2d 173 (9th Cir. 1958), *cert. granted*, 359 U.S. 965 (1959) (No. 854, 1958 Term; renumbered No. 52, 1959 Term).

60. See, *e.g.*, Harris v. United States, 331 U.S. 145, 154 (1947); United States v. Lefkowitz, 285 U.S. 452, 465–66 (1932); Gouled v. United States, 255 U.S. 298, 309 (1921). A recent United States Supreme Court decision apparently reaffirming this view is Abel v. United States, 80 Sup. Ct. 683 (1960) (dictum).

61. S. 1292, 86th Cong., 1st Sess. (1959).

Otherwise the protection of the fifth amendment becomes an antiquated relic. Of what avail is a defendant's privilege not to testify against himself if his most confidential conversations can be secretly recorded and reproduced before judge and jury?

If the fourth amendment is applied in this field, we will still be free to prevent the use of telephones and telegraphs as *instruments of crime*. This will end an admittedly inequitable existing situation in which criminals can take advantage of modern technological advances theoretically unavailable to the police. But the police will be precluded from using either wiretapping or electronic eavesdropping for *evidence-gathering*.

Most important of all, we can end wiretapping by private individuals and regulate tapping by state officers. If the FBI is allowed to tap when, and only when, the requirements of the fourth amendment are satisfied, the Department of Justice can prosecute wiretapping by others without appearing two-faced. For the first time, Congress will be able to pass a really effective wiretapping law, making it a crime to intercept conversations regardless of subsequent divulgence or use. Once we have ended the sorry spectacle of federal officers tapping in daily defiance of federal law, we can enforce our wiretapping laws just as stringently as we enforce other criminal statutes.

The dangerous consequences of continuing to countenance lawless law enforcement were recognized by Mr. Justice Brandeis in the *Olmstead* case. Mr. Justice Brandeis said:

> Crime is contagious. If the Government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means — to declare that the Government may commit crimes in order to secure the conviction of a private criminal — would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.[62]

Extension of the fourth amendment ban offers the only alternative to the pernicious doctrine so forcefully condemned by Mr. Justice Brandeis. When we bring wiretapping under the Constitution and wiretappers under the law, we will be taking a long step toward restoration of popular respect for both the Constitution and the law.

62. 277 U.S. at 485 (dissenting opinion).